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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

EBAY INC..

Plaintiff,

V.

DIGITAL POINT SOLUTIONS, INC.,
SHAWN HOGAN, KESSLER'S
FLYING CIRCUS, THUNDERWOOD
HOLDINGS, INC., TODD DUNNING,
DUNNING ENTERPRISE, INC., BRIAN
DUNNING, BRIANDUNNING.COM,
and DOES 1-20.

Defendants.

Case No. C 08-04052 JF PVT

**PLAINTIFF EBAY INC.'S REPLY IN
SUPPORT OF MOTION TO STRIKE
THE ANSWER OF DEFENDANTS
THUNDERWOOD HOLDINGS,
INC., BRIANDUNNING.COM AND
KESSLER'S FLYING CIRCUS**

Hearing Date: November 20, 2009
Time: 9:00 a.m.
Judge: Hon. Jeremy Fogel

1 **I. INTRODUCTION**

2 The opposition filed by Defendants Thunderwood Holdings, Inc. (“THI”),
 3 Kessler’s Flying Circus (“KFC”) and BrianDunning.com (herein, the “BD Entities”) to
 4 eBay’s motion to strike provides no justification for the BD Entities’ improper assertion
 5 of the Fifth Amendment privilege in their answer to eBay’s Second Amended Complaint
 6 (“SAC”). The BD Entities fail to cite even a single case that permits a collective entity to
 7 assert the Fifth Amendment in an answer to a complaint, nor do they address much of the
 8 controlling authority cited by eBay in its motion. The BD Entities instead 1) reargue their
 9 motion to stay and 2) ask the Court to rely on cases that are inapplicable to the issues
 10 raised by eBay’s motion. Because the BD Entities cannot take advantage of the individual
 11 defendants’ Fifth Amendment privilege to refuse to provide responses to eBay’s SAC, the
 12 BD Entities’ answer should be stricken.

13 **II. ARGUMENT**

14 **A. The BD Entities Fail To Justify Their Improper Assertion Of The Fifth**
 15 **Amendment**

16 The BD Entities do not contest that the improper invocation of the Fifth
 17 Amendment is a basis for striking an answer. Rather, they claim that their invocation of
 18 the Fifth Amendment in their answer to eBay’s SAC was justified because they cannot
 19 admit or deny the allegations of the SAC without implicating the Fifth Amendment
 20 privilege against self-incrimination held by Brian and Todd Dunning. The BD Entities’
 21 argument ignores the controlling authority set forth in eBay’s motion.

22 The law is clear that the Fifth Amendment privilege against self-incrimination does
 23 not extend to collective entities, even where the collective entity is a purported “one-
 24 person” entity. *See* eBay’s Motion to Strike (“eBay Strike Mot.”) at 3; *Bellis v. United*
25 States, 417 U.S. 85, 100 (1974) (holding that regardless of size, the Fifth Amendment
 26 privilege against self-incrimination does not extend to collective entities). Indeed, THI
 27 and BrianDunning.com have acknowledged in their motion to stay that “a business entity
 28 has no Fifth Amendment privilege against self-incrimination.” Motion to Stay of

1 Defendants Brian Dunning, THI and BrianDunning.com (Docket No. 133) at 14.

2 Having no Fifth Amendment privilege of their own, the BD Entities argue that
 3 Brian Dunning's invocation of his Fifth Amendment privilege "extends to" the BD
 4 Entities because Brian Dunning (along with his brother Todd Dunning, who, through
 5 Dunning Enterprise, Inc. ("DEI"), is also a representative of KFC) "is the only person
 6 who can respond on their behalf." Opposition of Defendants THI, KFC and
 7 BrianDunning.com to eBay's Motion to Strike ("BD Strike Opp.") at 3. Yet the BD
 8 Entities do not (and cannot) cite a single case that permits a collective entity to rely on an
 9 individual's Fifth Amendment privilege in a responsive pleading—even where that
 10 individual is the entity's sole representative. The BD Entities' argument instead rests
 11 entirely on generic Fifth Amendment cases discussing the circumstances under which *an*
 12 *individual* may assert the Fifth Amendment, *see* BD Strike Opp. at 3, 11 (citing cases that
 13 contain no discussion of whether collective entities may properly invoke an individual's
 14 Fifth Amendment privilege in an answer), and on their misplaced effort to distinguish
 15 cases regarding discovery issues not relevant to this motion. *See id.* at 12-13.¹

16 As a result, the BD Entities largely ignore the authority cited in eBay's motion to
 17 strike, which clearly establishes that a collective entity—regardless of its size and
 18 regardless of whether the only knowledgeable individual has invoked the Fifth
 19 Amendment privilege—must answer a complaint and, if necessary, appoint an agent to do
 20 so. *See* eBay Strike Mot. at 3-4.

21 The only case cited in support of eBay's motion to strike that the BD Entities

22 ¹ The following cases that the BD Entities attempt to "distinguish" in their opposition to eBay's
 23 motion to strike were not cited by eBay in its motion to strike at all: *Navel Orange Admin. Comm.*
v. Exeter Orange Co., 722 F.2d 449 (9th Cir. 1983); *United States v. 3963 Bottles, More or Less*,
 24 265 F.2d 332 (7th Cir. 1959); *Priebe v. World Ventures, Inc.*, 407 F. Supp. 1244 (C.D. Cal.
 1976); and *Central States v. Carstensen Freight Lines, Inc.*, No. 96 C 6252, 1998 WL 413490
 25 (N.D. Ill. July 17, 1998). These cases were cited by eBay only in its motion to compel (pending
 before Magistrate Judge Trumbull and set to be heard on November 13, 2009) in support of the
 26 argument that the BD Entities improperly refused to respond to discovery based on Brian and
 Todd Dunning's Fifth Amendment privileges. eBay's discovery motion raises legal issues
 27 distinct from those raised by this motion to strike, and the BD Entities' focus on these cases is
 somewhat inexplicable. In the interest of conserving judicial resources eBay will not address the
 28 BD Entities' wrongheaded discussion of case law relevant only to issues before a different court.

1 actually address is *SEC v. Leach*, 156 F. Supp. 2d 491 (E.D. Pa. 2001), the holding of
 2 which the BD Entities mischaracterize as being made “in passing” and as constituting
 3 “unpersuasive dicta.” *See* BD Strike Opp. at 14. In reality, the court in *Leach* directly
 4 confronted the issue of “whether it should excuse [the collective entity] from answering
 5 the Complaint on the ground that the only individual with the knowledge required to
 6 answer the Complaint . . . has invoked his Fifth Amendment privilege.” 156 F. Supp. 2d
 7 at 494. The *Leach* court unequivocally rejected this position, stating that the entity was
 8 required to appoint an agent to answer the complaint who could do so without fear of self-
 9 incrimination—which could include “the corporation’s attorney.” *Id.* at 498.

10 Moreover, the BD Entities entirely fail to address *City of Chicago v. Reliable Truck*
 11 *Parts Co.*, No. 88 C 1458, 1989 WL 32923 (N.D. Ill. Mar. 31, 1989), which also held that,
 12 if necessary, a collective entity must appoint an agent—who “need not have ‘first-hand
 13 personal knowledge’ of the facts reflected in the answers”—to satisfy its pleading
 14 obligations. *Id.* at *3. Because appointed agents can be educated in order to answer a
 15 complaint, it is irrelevant that the BD Entities “had no attorney representation prior to . . .
 16 June 2007” and that their current attorneys have “no knowledge of the information sought
 17 by eBay other than what has been told to them by Mr. Dunning.” *See* BD Strike Opp. at
 18 13; *Reliable Truck Parts Co.*, 1989 WL 32923, at *3 (an appointed agent can be educated
 19 by gathering information from books, records, other officers or employees, or other
 20 sources).

21 For this reason, it is simply not true that any responses to the SAC on behalf of the
 22 BD Entities “would necessarily implicate Mr. Dunning since he is the sole owner and
 23 representative of those entities.” *See* BD Strike Opp. at 3. The act of appointing an agent
 24 is not incriminating to Brian Dunning for Fifth Amendment purposes: “In fifth
 25 amendment terms, the act of having to appoint an agent, while compelled, is not
 26 testimonial and therefore does not implicate the fifth amendment.” *See In re Grand Jury*
 27 *No. 86-3 (Will Roberts Corporation)*, 816 F.2d 569, 574 (11th Cir. 1987), *abrogated on*
 28 *other grounds by Braswell v. United States*, 487 U.S. 99, 102 (1988).

1 The BD Entities' argument that they could not possibly appoint an agent to respond
 2 to eBay's SAC without compromising Brian and Todd Dunning's Fifth Amendment rights
 3 is also fatally undermined by two significant facts. First, DEI—the other of the two
 4 general partners of KFC, whose purported "sole representative" is Todd Dunning—has
 5 provided an answer to the SAC that does not assert any Fifth Amendment privilege. *See*
 6 Declaration of Colleen M. Kennedy in Support of eBay's Motion to Strike, previously
 7 filed on September 25, 2009, Ex. 4. Like Brian Dunning, Todd Dunning has asserted the
 8 Fifth Amendment in his answer to the SAC. That DEI can answer the SAC without
 9 abrogating Todd Dunning's Fifth Amendment rights shows that the BD Entities can do
 10 the same without abrogating the same rights of either Todd or Brian Dunning.

11 Second, KFC—of which the purported "sole representatives" are Brian and Todd
 12 Dunning—has provided substantive responses to eBay's Requests for Admissions,
 13 denying some 25 requests. *See* Declaration of Jean B. Niehaus in Support of eBay's
 14 Reply in Support of Motion to Strike, Ex. 1. These responses—which addressed matters
 15 occurring as early as 2003, *see id.*, Ex. 1 at 5—were signed by KFC's counsel, belying the
 16 BD Entities' claim that their current attorneys cannot be educated on pre-June 2007
 17 events. *See* BD Strike Opp. at 13-14. KFC's counsel is surely equally capable of signing
 18 an answer on KFC's behalf, as is any other person who may be educated on the matters
 19 necessary to respond to the SAC. Given these facts, the BD Entities cannot maintain that
 20 they are unable to appoint one or more agents to answer eBay's SAC; in fact, they are
 21 required to do so.

22 **B. This Motion Should Not Be Deferred Pending Resolution Of**
 23 **Defendants' Motion To Stay**

24 The BD Entities devote seven of the thirteen pages of their opposition to facts and
 25 argument relevant not to this motion to strike, but to their motion to stay currently pending
 26 before this Court. The BD Entities ask this Court to defer hearing eBay's motion to strike
 27 until after it rules on the motion to stay, suggesting that a stay would moot or otherwise
 28 decide the issues raised by this motion to strike. BD Strike Opp. at 7-10. But the BD

1 Entities fail to provide any basis to conclude that eBay's motion to strike is in any way
 2 dependent on the outcome of their motion to stay, much less that eBay's motion to strike
 3 would be mooted by the pending stay motion.

4 As an initial matter, eBay has demonstrated that a stay is not warranted in this
 5 action: because no indictments have issued and the timing of any potential future
 6 indictments cannot be predicted, all of the relevant factors weigh against the issuance of a
 7 stay. *See generally* eBay's Opposition to Defendants' Motions to Stay, filed October 30,
 8 2009 (Docket No. 151).

9 Regardless of the outcome of the motion to stay, however, the Court's ruling
 10 should have no bearing on eBay's motion to strike, for several reasons. First, the Court's
 11 inquiry on a motion to stay is fundamentally different from that posed by the present
 12 motion: a stay motion asks the Court to evaluate a number of factors, including the
 13 prejudice to the parties, whether the discovery process will be abused and the efficient use
 14 of judicial resources, while this motion simply asks whether the BD Entities improperly
 15 invoked the Fifth Amendment to avoid answering the SAC. Second, at least one court has
 16 held that the lack of an answer on file hinders the court's ability to decide a motion to
 17 stay. *See State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, No. Civ. A. 01-5530, 2002
 18 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002) ("The absence of an indictment coupled
 19 with the fact that this Court does not have an answer before it, impedes the Court's ability
 20 to discern the extent to which the legal and factual issues in the instant case are related to
 21 those under investigation.").

22 Finally, even if this action were ultimately to be stayed in some form after an
 23 indictment issues and if the relevant factors then weigh in favor of a stay, the BD Entities
 24 should be required to file a proper answer now. This case will ultimately proceed against
 25 the BD Entities, and an answer must be in place in any event. There is no justification for
 26 suspending eBay's right to obtain the BD Entities' response to the allegations of the SAC.
 27 eBay's motion to strike was filed several weeks before the BD Entities' motion to stay,
 28 and should be resolved independently of that motion.

1 **III. CONCLUSION**

2 The BD Entities have failed to justify their improper assertions of the Fifth
3 Amendment in their answer to eBay's SAC, and eBay's motion to strike should therefore
4 be granted.

5 DATED: November 6, 2009

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10 By: /s/ David R. Eberhart
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